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IN THE

Supreme Court of the United States

October Term, 1963

No. 20—WMCA, INC., ET AL., *Appellants, vs.* CAROLINE K. SIMON, SECRETARY OF STATE, ET AL., *Appellees.*

On Appeal from the United States District Court for the Southern District of New York

No. 29—THE MARYLAND COMMITTEE FOR FAIR REPRESENTATION, ET AL., *Appellants, vs.* J. MILLARD TAWES, GOVERNOR, ET AL., *Appellees.*

On Appeal from the Court of Appeals for Maryland

No. 23—B. A. REYNOLDS, JUDGE OF PROBATE, ET AL., *Appellants, vs.* M. O. SIMS, ET AL., *Appellees.*

No. 27—DAVID J. VANN AND ROBERT S. VANCE, *Appellants, vs.* BETTYE FRINK, SECRETARY OF STATE, ET AL., *Appellees.*

No. 41—JOHN W. MCCONNELL, JR., ET AL., *Appellants, vs.* BETTYE FRINK, SECRETARY OF STATE, ET AL., *Appellees.*

On Appeal from the United States District Court for the Middle District of Alabama, Northern Division

No. 69—LEVIN NOCK DAVIS, SECRETARY, STATE BOARD OF ELECTIONS, ET AL., *Appellants, vs.* HARRISON MANN, ET AL., *Appellees.*

On Appeal from the United States District Court for the Eastern District of Virginia

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BRIEF *AMICI CURIAE* IN NOS. 20 AND 29 AND MOTION FOR LEAVE TO FILE BRIEF AND BRIEF *AMICI CURIAE* IN NOS. 23, 27, 41 AND 69 FOR THE AMERICAN JEWISH CONGRESS, AMERICAN CIVIL LIBERTIES UNION AND N. A. A. C. P. LEGAL DEFENSE AND EDUCATIONAL FUND, INC.

LEO PFEFFER,
Attorney for American Jewish Congress,
15 East 84th Street,
New York 28, New York,

MELVIN L. WULF,
Attorney for American Civil Liberties Union,
156 Fifth Avenue,
New York 10, New York,

JACK GREENBERG,
Attorney for N. A. A. C. P. Legal Defense and Educational Fund, Inc.,
10 Columbus Circle,
New York 19, New York,

Amici Curiae.

ROBERT B. MCKAY,
Of Counsel.

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No. 69—Levin Nock Davis, Secretary, State Board of Elections, et al., *Appellants, vs.* Harrison Mann, et al., *Appellees.*

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BRIEF *AMICI CURIAE* IN NOS. 20 AND 29 AND MOTION FOR LEAVE TO FILE BRIEF AND BRIEF *AMICI CURIAE* IN NOS. 23, 27, 41 AND 69 FOR THE AMERICAN JEWISH CONGRESS, AMERICAN CIVIL LIBERTIES UNION AND N. A. A. C. P. LEGAL DEFENSE AND EDUCATIONAL FUND, INC.

To the Chief Justice and the Associate Justices of the Supreme Court of the United States:

The annexed brief *amici curiae* is filed on behalf of the the American Jewish Congress, American Civil Liberties Union, and the N. A. A. C. P. Legal Defense and Educational Fund, Inc. in *WMCA, Inc.* v. *Simon*, No. 20, and the *Maryland Committee for Fair Representation* v. *Tawes*, No. 29, pursuant to consent of the parties, submitted herewith.

Consent was withheld by appellants or by appellees in each of the closely related cases, *Reynolds* v. *Sims*, No. 23, *Vann* v. *Frink*, No. 27, *McConnell* v. *Frink*, No. 41, and *Davis* v. *Mann*, No. 69. This motion for leave to file the annexed brief *amici curiae* pursuant to Rule 42 is filed in those cases because of the difficulty of commenting on the first two named cases without being free also to comment on the last four. The six cases should be regarded as a unit because they represent various and interrelated facets of what is in reality a single issue, the definition of equal protection of the laws in the context of state legislative apportionment and districting.

Interest of *Amici*

The American Jewish Congress is an organization of American Jews which has as one of its aims the promotion of civil and political equality for all Americans.

The American Civil Liberties Union is a nation-wide nonpartisan organization engaged solely in the defense of individual liberties particularly as set forth in the United States Constitution and the amendments thereto.

The N. A. A. C. P. Legal Defense and Educational Fund, Inc. is an organization dedicated to the task of broadening democracy and securing equal justice under the Constitution and laws of the United States.

The noting of jurisdiction by the Court in these cases is of special importance in view of the decision in the 1961 Term of *Baker* v. *Carr*, 369 U. S. 186 (1962), and the decision in the 1962 Term of *Gray* v. *Sanders*, 372 U. S. 368 (1963). *Baker* v. *Carr* was a door-opening decision which confirmed the important proposition that fourteenth amendment claims of impairment of the right of political franchise, as a result of malapportionment of state election districts, are justiciable in the federal courts. This Court did not at that time suggest the precise standards against which such claims should be tested beyond noting that "judicial standards under the Equal Protection Clause are well developed and familiar * * *." 369 U. S. at 226. There was also no occasion for the Court in *Baker* to specify appropriate remedies where invalid apportionment is found, beyond the observation that "we have no cause at this stage to doubt the District Court will be able to fashion relief if violations of constitutional rights are found * * *." *Id.* at 198.

In *Gray* v. *Sanders*, which was not, strictly speaking, an apportionment case, this Court made it clear that, at least in the context of a statewide primary election, full equality of voting rights is required by the equal protection clause of the fourteenth amendment. As Mr. Justice Douglas noted, the controlling principle must be "one person, one vote." 372 U. S. at 381. Justices Stewart and Clark, concurring, agreed upon the primacy of the equal protection principle in that situation when they referred to "one voter, one vote." *Id.* at 382.

The cases now before the Court, from Alabama, Maryland, New York, and Virginia, offer an appropriately wide spectrum of factual situations so that it will be possible for the Court to give meaning to the equal protection command

of the fourteenth amendment. Plaintiffs in each case allege discrimination against voting in the more populous areas, whether intentional or more or less accidental. The cases differ in the degree of population disparity among election districts and in the source of the preference for one class of voters against other classes, which sometimes arises out of state constitutional requirements, sometimes out of statutory provisions, and sometimes out of legislative failure to act where, as a matter of state law, reapportionment is a periodic legislative obligation. But in all cases alike the central issue is one of differentiation among voters on bases other than population.

Each of the *amici* has a deep concern with protection of the right of franchise as the only sure preservative of representative democracy. They are accordingly pledged to the elimination of all interference with the free exercise of the franchise. The concern of the *amici* extends equally to any limitation on the right of franchise, whether the fact of unequal treatment derives from an accident of history or from an explicit intention to prefer one class at the expense of another. More specific focus for this generalized concern develops out of the fact that the ordinary pattern of voter discrimination, certainly in all the cases now before the Court, works to the disadvantage of urban and suburban areas.

Each of the *amici* has a special interest in assuring equal recognition for the social, economic, and political interests of minority groups that have been particular targets of majority discrimination, whether on grounds of race, religion, national origin, or because of the expression of unpopular political beliefs. These minority groups tend to concentrate in the more populous areas, perhaps because they find there greater numbers with like interests, possibly

because they can in the cities achieve greater anonymity, or simply because the cities have ordinarily given more hospitable shelter to minority-interest groups. Whatever the reason, the observed fact is that minority groups cluster in the cities. Cf. *MacDougall* v. *Green*, 335 U. S. 281, 288-89 (Douglas, Black, and Murphy, JJ., dissenting); *South* v. *Peters*, 339 U. S. 276, 278-79 (1950) (Douglas and Black, JJ., dissenting). The *amici* are accordingly especially sensitive to discrimination against the urban voter because of the resulting partial disfranchisement of minority groups.

WHEREFORE, it is respectfully prayed that the annexed brief be read not only in relation to the cases in which consent has been secured, *WMCA, Inc.* v. *Simon*, No. 20, and *The Maryland Committee for Fair Representation* v. *Tawes*, No. 29, but as well in relation to the cases in which consent has been withheld, *Reynolds* v. *Sims*, No. 23, *Vann* v. *Frink*, No. 27, *McConnell* v. *Frink*, No. 41, and *Mann* v. *Davis*, No. 69.

Respectfully submitted,

LEO PFEFFER,
Attorney for American Jewish Congress,
15 East 84th Street,
New York 28, New York,

MELVIN L. WULF,
Attorney for American Civil Liberties Union,
156 Fifth Avenue,
New York 10, New York,

JACK GREENBERG,
Attorney for N. A. A. C. P. Legal Defense and Educational Fund, Inc.,
10 Columbus Circle,
New York 19, New York,

ROBERT B. MCKAY,
Of Counsel.

Amici Curiae.

BRIEF

The Question to Which This Brief is Addressed

This brief is addressed to the single question whether the equal protection of the laws clause of the fourteenth amendment should be defined, in the context of state legislative apportionment and districting, to require equality of voter representation in election districts in each house of a state legislature, except for minor variations based on mathematical necessity or in recognition of governmental interests of an exceptional character to be specifically justified in each case of deviation from full equality.

Statement

These six cases have been brought to this Court on appeal from final judgments of three-judge federal district courts sitting in Alabama (Nos. 23, 27, and 41), New York (No. 20), and Virginia (No. 69), and from the Maryland Court of Appeals (No. 29). These are the first cases since *Baker* v. *Carr* to bring before the Court the issue of fixing appropriate standards for application of the equal protection of the laws clause of the fourteenth amendment to state legislative apportionment and districting. The facts of the cases may be briefly summarized.

WMCA, Inc. v. *Simon*, No. 20, a class action, was brought under the Civil Rights Act (42 U. S. C. §§1983, 1988) and the parallel jurisdictional provision (28 U. S. C. §1343). The individual appellants are New York citizens and voters residing in the counties of New York, Bronx,

Kings, Queens, Suffolk, and Nassau. Appellant WMCA, Inc. is a New York corporation and taxpayer having its principal place of business in New York County. Appellees are various state, county and city officials. The complaint alleged that the apportionment and districting provisions in the state constitution and implementing statutes deprived appellants of due process and equal protection of the laws as guaranteed them by the fourteenth amendment to the United States Constitution.

The record shows that the state constitutional provisions regulating apportionment of the New York State Senate necessarily discriminate against the large urban areas. Thus, since 1953, the citizen population per senator in the five most populous counties (Bronx, Erie, Kings, New York, and Queens), based on the 1950 census, was 301,178, while the per senator ratio in the remaining counties was 195,859. Apportionment, pursuant to the 1960 census figures will be still more unfavorable to the six most populous counties (now including Nassau) than the present allocations.

The provisions governing seats in the State Assembly also favor the small counties. Under the 1960 census, the following results would be indicated. The smallest 44 counties would each receive one seat for an average of 62,765 citizen inhabitants per seat; three counties would receive 2 seats each for a total of 6, who would represent an average of 93,478 citizen inhabitants; and the fourteen most populous counties would be entitled to 100 seats for an average representation figure of 129,183 citizen inhabitants per seat.

The complaint alleged that application of the above provisions and the currently controlling statutes necessarily

results in gross disproportion between population and representation. (At present, the largest assembly district has 21 times as many citizens as the smallest; the largest senate district 3.9 times as many as the smallest.) Appellants offered to prove (1) that the apportionment formula in the 1894 constitution, which still controls, was intentionally adopted to limit the representation of urban residents on the ground, among others, that such residents were believed to be morally and intellectually inferior; and (2) that as a result appellants and others similarly situated suffer economic and other discriminations amounting to a denial of due process of law.

The three-judge court before which the case was heard concluded that there was no violation of the fourteenth amendment, saying in part that the New York apportionment provisions "are rational, not arbitrary, are of substantially historic origin, contain no geographical discrimination, permit an electoral majority to alter or change the same and are not unconstitutional under the relevant decisions of the United States Supreme Court." (208 F. Supp. 368, 380.)

The Maryland Committee for Fair Representation v. *Tawes*, No. 29, was filed in the appropriate Maryland state court by individual appellants, residents of the City of Baltimore and the four so-called "suburban counties," and by an unincorporated association, The Maryland Committee for Fair Representation. The complaint, filed against the governor and appropriate election officials, alleged severe underrepresentation of the City of Baltimore and of the four most populous counties in both houses of the state legislature. Based on 1960 census figures the counties of Anne Arundel, Baltimore, Montgomery, and Prince

Georges, and the City of Baltimore have 76 per cent of the state's population, but when the suit was initiated elected only 34 per cent of the state senators and only 49 per cent of the members of the house of delegates. (The latter proportion was increased to 55 per cent by legislative action during the course of the litigation, but the claim of invalid underrepresentation continues before the Court.) The largest senate district has 32 times the population of the smallest and, even after the 1962 changes in the house of delegates, the ratio there is 6 to 1.

The trial court held that the composition of the house of delegates was invalid, but that that of the senate was valid. Its decision as to the senate was affirmed by the state court of appeals by a four-to-three vote. The state court upheld election of state senators on a county basis (with additional senators for the City of Baltimore; but not in proportion to population) on the basis of state historical precedent and in reliance on the so-called federal analogy.

The three Alabama cases, *Reynolds* v. *Sims*, No. 23, *Vann* v. *Frink*, No. 27, and *McConnell* v. *Frink*, No. 41 (hereafter referred to collectively as *Reynolds* v. *Sims* or as the Alabama case) were brought as a single suit in behalf of duly qualified voters residing in Jefferson, Etowah, and Mobile Counties, as a class action against the Alabama secretary of state and other officials who are charged with responsibility for the election of members of the state legislature. The action was brought in August 1961 under the Civil Rights Act, 42 U. S. C. (1983, seeking a declaration of rights concerning apportionment of representatives and senators among the counties of Alabama and for such further relief as may be necessary to assure them in this respect the equal protection of the laws.

Alabama presented the familiar picture of legislative malapportionment due primarily to the failure of the legislature to reapportion for 60 years. Based on the 1960 census figures, the number of persons represented by members of the lower house in Alabama varied from 104,767 in Mobile County to 6,731 in Bullock County. The senatorial districts varied from 15,417 in District No. 16 (Lowndes County) to 634,864 in District No. 13 (Jefferson County).

The court below concluded that the existing apportionment was invalid. It further ruled that neither a proposed constitutional amendment nor legislation adopted in 1962 met the standards of the United States Constitution. However, it accepted the legislation in part as a temporary expedient for the 1962 election, pending later legislative correction. The court retained jurisdiction pending more equitable apportionment by the legislature.

Mann v. *Davis*, No. 69, was brought by appellees, qualified voters of Virginia residing in Arlington and Fairfax Counties and in the City of Norfolk, under the Civil Rights Act, 42 U. S. C. §§1983, 1988, asserting jurisdiction on the basis of 28 U. S. C. §1343 and the declaratory judgment act, 28 U. S. C. §2201. Appellants are the attorney general of Virginia and members of the state board of elections. In the original complaint appellees sought (1) a judgment voiding state laws apportioning the state legislature; (2) injunctive restraint of appellants from conducting elections under the laws; and (3) an apportionment by the court if the general assembly should fail, after a decree of injunction, to reapportion.

Acting under Sections 40-43 of the Virginia constitution, the Virginia general assembly, in 1962, established 36 senatorial districts, assigning them 40 senators, and 70 dis-

tricts for the house of delegates, distributing 100 seats among them. The 1962 acts produced disparities in terms of voter representation by each member of more than 2 to 1 in the senate and more than 4 to 1 in the house of delegates.

The three-judge district court found that population had historically been the principal factor in redistricting in Virginia, but that it was not the sole criterion under the equal protection clause. It declared that the proof of inequality of representation on the basis of population placed on the defendants the burden of explanation, a burden they had failed to meet. Accordingly, the majority of the court in a two-to-one decision, found "no rational basis for the disfavoring of Arlington, Fairfax and Norfolk." 213 F. Supp, 577, 585. A judgment was entered declaring the apportionment acts invalid and enjoining further proceedings thereunder, but staying operation of the injunction until January 31, 1963, to allow corrective action by the general assembly in special session. On December 15, 1962, this stay was further extended by the Chief Justice.

Summary of Argument

IA. Across the nation, in nearly every state, election districts for state legislative bodies are sadly askew in terms of equality of voter representation. This is markedly true in each of the four states, Alabama, Maryland, New York, and Virginia, whose apportionment systems are now before the Court. Whether tested in terms of the minority of the electorate empowered to elect a majority of legislators, in terms of excessively wide variations from the statistical average of voters in each election district,

or in relation to the ratio between the most populous and least populous election districts, the result is the same: Severe disparities in voter representation are manifest in each of these legislative bodies. Unfortunately, the situation in these states is not exceptional. It is all too typical of the widespread malapportionment which in 1963 infects the American state legislative process.

Almost without exception the voters most underrepresented in their state legislatures are city dwellers. However, population shifts predicted within the next decade are likely to confer that distinction upon the suburban areas.

Even among the generally overrepresented rural areas there is ordinarily, perhaps more by accident than by design, sharp differentiation in electoral representation even between election districts which are nearly alike in such measurable respects as population, area, and economic interests. This kind of "crazy quilt" inequality is present to some degree in all the cases now before the Court.

B. The harms attendant upon inequality of voter representation are first of all individual to the voters involved. Complainants in each case suffer personal denials of the equal protection of the laws by virtue of the impairment of their right of franchise as compared with others similarly situated.

A second harm, the collective result of the individual harms, derives from evident deterioration in the effectiveness of state legislative processes. Where the cities are underrepresented—the usual case—it is demonstrable that depite their larger proportionate contributions to the tax income of the state, their per capita returns are maintained at levels inadequate to deal satisfactorily with the complexities of urban life.

A third harm which frequently arises out of malapportioned legislatures is the legislative stalemate. Where members of both houses of a legislature predominantly represent minority interests in the state, but where the governor represents, as he ordinarily does, prevailing sentiments of the state as a whole, the sorry spectacle of the legislative impasse is the not uncommon result. Even if one house of the legislature is chosen essentially on a population basis, while the other is controlled by minority interests, similar difficulty in the legislative process is likely.

A fourth harm arising out of existing malapportionment is the distortion thereby occasioned to the whole concept of federalism and the American scheme of representative democracy. As state legislatures become increasingly moribund through legislative stalemate, and decreasingly responsive to legitimate claims that are effectively silenced as a result of severe underrepresentation, the affected units, usually the cities, turn elsewhere for relief. To some extent they may turn inward through the use of local tax levies, while resisting as firmly as possible otherwise legitimate state claims upon their resources. More significantly, they are likely to look outward, particularly seeking aid from the federal government. To the extent that cities find it necessary to reach over the governmental heads of their states, the whole structure of federalism is weakened.

II. The factual demonstration of gross inequality in voter representation in all these cases is undisputed, as indeed it is indisputable. As a result, the ordinary presumption of validity of state constitutional and statutory provisions is overcome, and defendant state officials must

justify all inequalities in terms of a rational state purpose that is neither grounded in intentional discrimination nor, whatever the intent, inherently discriminatory in its operation.

III. The justifications which are advanced in support of malapportioned state election districts are all insufficient to overcome the prima facie (or even per se) showing of gross inequality demonstrated in each of the cases before the Court.

A. It is plain that area as such does not deserve representation in state legislatures. However, it is also argued that rural interests should be represented out of proportion to population because rural voters are scattered over a substantial area as contrasted with the concentrated population clusters in the cities. The doubtful factual basis for this contention is an entirely insufficient justification for apportionment schemes that grossly reduce the voting strength of urban voters.

B. The appeal to history in justification for inequalities of voter representation cannot withstand analysis under the challenge of the equal protection clause of the fourteenth amendment, which must be read in the present tense. The long continuance, and even aggravation, of voting inequalities cannot be justified on the ground that the discriminated-against individuals and groups have lost their right of protest in the sands of time.

This is not to say that historic divisions of the state into local governmental units must be totally disregarded, but only that history as such does not in this context speak with a voice of logic.

C. Reliance on the so-called federal analogy must also be rejected. None of the reasons advanced in favor of one population-based house and one house chosen without regard to population is meritorious.

1. The Constitution itself rejects the relevance of the analogy to the method of selection of members of the two houses of Congress. History shows that the organization of the Senate was regarded as an exception to the equal protection principle, which is made binding on the states by the fourteenth amendment.

2. Reliance on the federal analogy is an after-the-fact rationalization for apportionment schemes that have little in common with the congressional plan of representation.

3. Counties and towns, unlike states, have no sovereign existence apart from the state which created them and which could at any time alter their boundaries or terminate their existence.

4. Where both houses of a state legislature are chosen on an equal-population basis they still serve separate functions as restraints upon each other. The terms of office are customarily different, as are the constituencies. Members of the more numerous house will ordinarily represent voters who are relatively homogeneous in their interests, while members of the less numerous house will necessarily represent a larger number of voters with more varied and heterogeneous interests.

5. There is no justification for allowing any minority interest group, whether rural or any other, to gain absolute control of a state legislature with concomitant power to enact legislation unacceptable to the majority.

D. Neither the availability of the initiative nor the opportunity for the convening of periodic or special constitutional conventions is an adequate substitute for the choice of state legislators on the basis of equality of voter representation. The right of each voter to have equal weight given to his vote along with other like-situated voters is present and permanent and should not be made subject to the costly uncertainties of the initiative. Moreover, the Constitution prohibits the imposition of inequalities even by majority vote.

E. The only argument which has any merit as a possible supplement—but not substitute for—the equal-population principle is the proposition that in drawing election districts some respect should be accorded to existing governmental boundaries. Two arguments in support of according this much deference to established state practice deserve mention: (1) Counties and other local governmental units continue to exercise some functions of government and thus may deserve a hearing in state legislative assemblies through legislators who will have those interests in mind. (2) Preservation insofar as possible of existing governmental lines can be helpful in preventing the harm of gerrymandering.

While these considerations may be given weight, they do not justify disregard of the equal-population principle which must remain primary in both houses of the state legislature. Accommodation to existing district lines is permissible only to the extent that it can be accomplished without significant deviation from the equal-population principle. Both objectives can be satisfied to a very substantial extent in redrawing district lines in each of the cases before the Court.

ARGUMENT

I

THE WIDE DISPARITY IN THE EFFECTIVENESS OF THE VOTES CAST IN THE STATES AFFECTED BY THE INSTANT CASES IS A DENIAL OF THE EQUAL PROTECTION OF THE LAWS GUARANTEED AGAINST STATE ABRIDGEMENT BY THE FOURTEENTH AMENDMENT.

A. The discrimination arising out of the unequal apportionment in each of the cases before this Court is both gross and arbitrary.

1. The gross discrimination against urban and suburban areas

In the second half of the twentieth century two disturbing features of the state legislative process in the United States have become commonplace. In the first place, official studies have confirmed what has long been common knowledge to the average citizen: most state legislatures are ill suited to the tasks of government with which they are charged. See, *e.g.*, U. S. Comm'n on Intergovernmental Relations, *Report to the President* 38-42 (1955); House Comm. on Government Operations, *Federal-State-Local Relations: Federal Grants-in-Aid*, H. Rep. No. 2533, 85th Cong., 2d Sess. 47-49 (1958). The malfunctioning of the state legislative process is particularly marked in the ordinary failure of state legislatures to deal adequately with the peculiarly complex problems of urban areas within their respective borders and with the still more acute problems of urban areas that lie in two or more states. *Ibid.*

See also The Editors of Fortune, *The Exploding Metropolis* 1 (1957).

In the second place, it is painfully apparent that state legislatures have become during the twentieth century progressively less representative of the majority of the electorate within their respective states. In the 99 state legislative bodies (all 50 states are bicameral except Nebraska) the population represented by each legislator ranged in 1960 from just over 2 to 1 to the incredible disparity of 987 to 1. David and Eisenberg, *Devaluation of the Urban and Suburban Vote* 3 (vol. I, 1961). When the 99 legislative bodies are viewed from another perspective, it appears that the percentage of the electorate which can elect a majority ranges from 8 per cent to 47.8 per cent in senate districts and from 12 per cent to 48.1 per cent in lower house districts. Goldberg, *The Statistics of Malapportionment*, 72 Yale L. J. 90, 100 (1962). Only five states are apportioned so that a majority of both houses are elected by over 40 per cent of the population. *Id.* at 90-91.

It is more than coincidence that these two propositions, the decline in the effectiveness of the state legislative process and the malapportionment of state legislatures, have traveled a parallel and converging course. As malapportionment has mounted across the nation, the failure of state legislatures to deal effectively with vital problems of state government has become more marked. See Lewis, *Legislative Apportionment and the Federal Courts*, 71 Harv. L. Rev. 1057, 1059-66 (1958). Yet, the alarming fact is that the pattern of state legislative malapportionment, apparently without exception, shows an unmistakable bias in favor of rural areas that continue to lose population and against urban (and now suburban) areas that continue

to gain population. See David and Eisenberg, *Devaluation of the Urban and Suburban Vote* (vols. I and II, 1961 and 1962); Baker, *Rural versus Urban Political Power* (1955); *Cf.* Hacker, *Congressional Districting* (1963).

The general pattern of discrimination against urban and suburban areas, outlined above, is manifested in each of the states in which the present cases arose. In the Alabama case, Nos. 23, 27 and 41, it was "generally conceded throughout this litigation by all the parties that the present apportionment of both Houses of the Legislature of the State of Alabama constitutes 'invidious indiscrimination' in violation of the Equal Protection Clause of the Fourteenth Amendment." *Sims* v. *Frink*, 208 F. Supp. 431, 435 (M. D. Ala. 1962). The facts outlined above (pp. 9-10) plainly compelled this conclusion.

In the Maryland case, No. 29, before the enactment of partial but inadequate remedial legislation in 1962, 76 per cent of the state population, located in the five most populous subdivisions of the state, elected only 34 per cent of the house of delegates and 49 per cent of the senate. No. 29, R. 189. Under section 2 of article III of the Maryland Constitution one senator is elected from each of the 23 counties of the state, and one senator from each of 6 legislative districts in the City of Baltimore. As a result less than 15 per cent of the population of Maryland can elect a majority of the state senate. A citizen's vote for a state senator in the most underrepresented county is worth 3 per cent of the vote of a resident in the most overrepresented and least populous county. R. 189. In the lower house, even under changes adopted in 1962, the five most populous political subdivisions, containing 76 per cent of the population, elect only 55 per cent of the members of the house of delegates.

In the New York case, No. 20, the data described above (pp. 6-8) plainly show the existing discrimination against urban and suburban areas. Moreover, the discrimination will steadily increase under the constitutional formula now in effect. The heavy disproportion between the representation accorded districts which are urban and those which are rural is emphasized by the fact that in only five other states are counties with population under 25,000 more over-represented than in New York. David and Eisenberg, *Devaluation of the Urban and Suburban Vote* 14-15 (vol. I, 1961).

In the Virginia case, No. 69, the three-judge district court, in holding invalid the state constitutional provisions for apportionment in both houses of the state legislature, found "no rational basis for the disfavoring of Arlington, Fairfax and Norfolk." *Mann* v. *Davis*, 213 F. Supp. 577, 585 (E. D. Va. 1962). The court noted that in the senate Arlington and Fairfax Counties and the City of Norfolk elected only five senators with an average population per senator of more than 150,000 while six other senators represented districts with an average population per senator of less than 75,000. The imbalance in the house of delegates was even more striking; each of the three delegates from Fairfax County represented a population of 95,064 while twenty delegates from other districts represented fewer than 30,000 each. *Id.* at 582-83.

2. The arbitrary discrimination resulting from "crazy-quilt" patterns of apportionment

To the extent that the unequal apportionment revealed in these cases does not show a consistent pattern of discrimination against urban and suburban areas, it is still

open to constitutional attack as being wholly unreasonable and arbitrary. The record is replete with instances of what have come to be known as "crazy quilt" inequalities, adopting the expressive phrase used by Mr. Justice Clark in his concurring opinion in *Baker* v. *Carr*, 369 U. S. 186, 254 (1962). Speaking of the absence of any discernible pattern in the Tennessee apportionment there at issue, he said:

> when the entire table [of population per legislator] is examined—comparing the voting strength of counties of like population as well as contrasting that of the smaller with the larger counties—it leaves but one conclusion, namely that Tennessee's apportionment is a crazy quilt without rational basis.

The same point can be made in connection with each of the apportionment schemes now before the Court.

Alabama: On the eastern edge of Alabama, near the Florida line, are clustered five counties, all largely rural in nature, with 1960 population figures as follows: Barbour (24,700); Bullock (13,462); Lee (49,754); Macon (26,717); and Russell (46,351). Before the 1962 judicial reapportionment, Barbour, Lee, and Russell counties were allotted two representatives and the others only one. Oddly enough, however, Macon County, with one representative, has a larger population than Barbour County, with two representatives. Moreover, the population per representative in Macon County is more than twice that of Barbour County. See *Sims* v. *Frink*, 208 F. Supp. 431, 447-49 (M. D. Ala. 1962). On the senate side the picture was not different in the same counties. District number 24 consists of Barbour County alone (24,700); district number 26 includes Bullock and Macon (40,179); and district number 27 in-

cludes Lee and Russell (96,105). *Id.* at 450. The arrangement makes no sense at all.

Maryland: Washington County, with a 1960 population of 91,219, has one senator, as does Queen Anne's County with a population of 16,569, and Baltimore County, with a population of about half a million. The three suburban counties of Anne Arundel, Montgomery and Prince Georges have three senators for about one million but the City of Baltimore, with a population of less than a million, has six senators. In this instance discrimination without rational pattern cuts both ways. The rural counties are favored over urban and suburban alike, while the exclusively urban counties are favored at the expense of the suburban. Even though this latter inequity results more from the accident of population growth than from invidious intent, the arrangement appears to be formless in the "crazy quilt" sense.

New York: Disparities of 2 to 1 exist, and are compelled by the state constitution, with respect to the size of assembly districts in a single county, entirely without regard to the rural or urban character of that county. This is the case, for example, in Onondaga County where the assembly districts range in size (on the basis of the still-controlling 1950 citizen population) from 83,613 to 167,226. No. 20, R. 283. Other examples of "crazy quilt" disparities in New York State are outlined in appellants' brief on the merits.

Virginia: Despite the division of some counties in the fixing of senate and house of delegates districts, and the use of floterial districts, adjacent districts with apparently similar voter compositions vary widely in terms of population represented by individual senators and delegates. To

give a single example: Two senatorial districts at the remote western tip of Virginia differ in population ratio by more than 2 to 1, despite the fact that they are adjacent and both are essentially rural. Lee and Scott Counties make up a senate district with a 1960 population of 51,637, while Buchanan, Russell, and Tazewell Counties, also cumulated into a single district, have a population of 107,805. If Russell, for instance, had been joined to Lee and Scott, the differential between the two districts would have been less than 5 per cent. No. 69, R. 12.

Again, it is apparent that the voter discriminations in each of these two cases, whether intentional or accidental, demonstrate in this respect also a violation of the equal protection clause of the fourteenth amendment.

B. Inequality of voter representation deprives individual voters of the equal protection of the laws.

1. The right to vote

This Court long ago recognized that "The right to vote is a personal right." *United States* v. *Bathgate*, 246 U. S. 220, 227 (1918). In *Baker* v. *Carr*, 369 U. S. 186, 208 (1962), Mr. Justice Brennan made the same point specifically in relation to apportionment:

> A citizen's right to vote free of arbitrary impairment by state action has been judicially recognized as a right secured by the Constitution, when such impairment resulted from dilution for a false tally, *cf. United States* v. *Classic*, 313 U. S. 299; or by a refusal to count votes from arbitrarily selected precincts, *cf. United States* v. *Moseley*, 238 U. S. 383, or by stuffing of the ballot box, *cf. Ex parte Siebold*, 100 U. S. 371; *United States* v. *Saylor*, 322 U. S. 385.

For other instances in which the Court has recognized that the right of franchise is entitled to protection against dilution or other unjustified impairment, see *Ex parte Yarbrough*, 110 U. S. 651 (1884); *Wiley* v. *Sinkler*, 179 U. S. 58 (1900); *Swafford* v. *Templeton*, 185 U. S. 487 (1902); *Smith* v. *Allwright*, 321 U. S. 649 (1944); *Gomillion* v. *Lightfoot*, 364 U. S. 339 (1960); and *Gray* v. *Sanders*, 372 U. S. 368 (1963).

Complainants in each of the cases before the Court have suffered personal and individual denials of the equal protection of the laws by virtue of the impairment of their right of franchise as compared with others similarly situated. There is reason to believe that that denial is at least in part deliberate—that state legislators have consciously reduced the weight of the urban and suburban vote.* But even if that were not so, the discrepancy in the value of the individual vote must be regarded as a denial of equal protection unless some rational explanation for it is offered. As we show below, in Point III, that has not been done.

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* The three-judge court in the New York case, No. 20, excluded evidence, we believe erroneously, that would have shown that the present New York formula, based on the 1894 New York Constitution, was the result of a deliberate intent to discriminate against urban voters. No. 20, R. 140, 142, 143-46. That constitution was the first to depart from the equal-population principle (Silva, *Apportionment in New York*, 30 Fordham L. Rev., 581, 597-600 (1962); 31 *id.* 1, 2-13), and the reasons were made perfectly clear at the time. As one delegate put it, "* * * the average citizen in the rural district is superior in intelligence, superior in morality, superior in self-government, to the average citizen of the great cities * * * [and] your government will be safer in his hands than in the hands of the average citizen of the great cities * * *" (4 *Revised Records of the Constitutional Convention of the State of New York*, 10-11 (1900)).

2. Impairment of the state legislative process

A second harm that results from the malapportionment here complained of is damage to the state legislative process, on which success of a representative democracy must in large part depend. Because, as we have shown, malapportionment reduces the voice of the urban and suburban voters in their state government, the city dwellers and their compatriots in the nearby suburbs find that the communities in which they work and live are short-changed in a variety of ways at the hands of legislators who represent primarily rural voters.

It is common knowledge that in states with large metropolitan centers the cities contribute a larger per capita share of the total state revenues than do other areas. But the per capita return to the cities is ordinarily smaller than the proportionate return to the rural areas. The remedial steps taken by the cities have been twofold, both unfortunate for the integrity of the state governmental process. (1) The great cities have increasingly found it necessary to resort to extraordinary measures to help finance the slighted metropolitan needs, such as the 4 per cent sales tax in New York City. (2) The cities have more and more often taken their problems to the national government, seeking assistance in planning for and financing of housing, transportation, and schools, the three most costly and critical problems faced by every city. "Paradoxically enough, the interests of the urban areas are often more effectively represented in the national legislature than in their own state legislatures." U. S. Commission on Intergovernmental Relations, *Report to the President* 40 (1955).

Demonstration of discrimination against urban areas at the hands of malapportioned state legislatures is readily available. Evidence offered but excluded in the New York case, No. 20, would have shown that the malapportioned legislature in fact discriminated against urban residents in allocating tax revenues and distributing benefits. No. 20, R. 140, 142, 147-48.

Discrimination against the more populous areas is by no means confined to money matters. In Maryland, for example, the grossly unrepresentative state senate refused in 1963 to abandon the unit vote system even after the decision in *Gray* v. *Sanders*, 372 U. S. 368 (1963), invalidating an equivalent Georgia plan. The same body approved a congressional redistricting bill which provides a district for the Eastern Shore counties with a population of 243,570, while another district, including populous Montgomery County, will have 608,666 residents. Note, *Senate Reapportionment—The Maryland Experience*, 31 Geo. Wash. L. Rev. 812, 821 (1963). The Maryland legislature even demonstrates how racial discrimination may develop out of malapportionment. The 1963 Equal Accommodations bill contains exemptions for twelve counties, all rural. "A comparison of the counties exempted with population cannot fail to demonstrate in this case the invidious nature of the discrimination of minority rule and the denial of the equal protection of the laws." *Id.* at 822.

3. Legislative stalemate

Malapportionment frequently contributes to legislative stalemate, which may arise in at least two situations. First, if urban voters are discriminated against in both houses

of the state legislature, while the governor remains responsive to the electorate as a whole, he may exercise his powers of restraint, particularly by way of veto, as a check upon legislative disregard of the majority will. The issue takes on special significance in the light of *Gray* v. *Sanders*, 372 U. S. 368 (1963), in which this Court ruled explicitly that any state official selected on a state-wide basis, whether at a primary or general election, must be chosen on a strict one man-one vote basis without weighting for any special interests, rural or otherwise.

However fortunate it may be that the chief executive of the state, considering himself responsive to the whole electorate without favoritism to any special interest group, may restrain an unrepresentative and perhaps irresponsible legislature, this is nonetheless not effective government. Since the governor himself has no legislative authority, the most he can do is to oppose without necessarily being able to secure the enactment of any affirmative program. New York is a vivid example. It is a two-party state with a one-party legislature. Tyler and Wells, "New York: 'Constitutionally Republican,'" in *The Politics of Reapportionment*, ch. 13 (1962).

A second kind of legislative stalemate which may evolve out of malapportionment arises where one house of the legislature is chosen to some extent in accordance with the equal-population principle, while the other, selected without regard to population, considers itself primarily responsible to some special interest group, usually the rural voter. An especially striking illustration of the resulting difficulties is found in the 1963 session of the Maryland legislature. After the house of delegates had been reapportioned to conform in part to voter equality among election

districts, while the senate remained unchanged, a number of important pieces of legislation were stalled. See part III of the Brief of Appellants in the Maryland case, No. 29.

A legislature divided between its two houses on the essentials of legislative policy is no legislature at all. It is merely a platform for the ventilation of political controversy.

4. Undermining of the federal system of government

Malapportionment also threatens the concept of federalism which has always been central to the scheme of representative democracy in the United States. As state legislatures become increasingly moribund and less and less responsive to demands for legislative action, voters who have lost their chance for a meaningful hearing, and cities whose legitimate claims for assistance in solving problems of urbanization have been drowned in silence, turn elsewhere for assistance. Legislative refusal to act, or legislative impasse, invites an electorate bypass.

A fundamental premise of the American constitutional system is that the states are equal partners with the national government. The demand for states' rights makes no sense in the case of those states which have failed to satisfy their primary obligation of service to majority interests. Only when these needs are satisfied can the plea of states' rights become again the dignified and meaningful claim to separate sovereign rights that it should always have been rather than the strident and prideful cry it has sometimes seemed.

II

THE ORDINARY PRESUMPTION OF VALIDITY OF STATE CONSTITUTIONAL AND STATUTORY PROVISIONS IS OVERCOME BY A SHOWING OF GROSS INEQUALITIES IN VOTER REPRESENTATION, AND THEREAFTER THE BURDEN OF JUSTIFICATION RESTS UPON THE STATES.

"Judicial standards under the Equal Protection Clause are well developed and familiar * * *" *Baker* v. *Carr*, 369 U. S. 186, 226 (1962). The clause has developed over the years as a general restraint upon unreasonable classifications imposed by state authority. In this role it has been invoked in a number of diverse contexts. Analytically, however, the cases may be grouped into two principal categories, each of which has generated a somewhat different application of the equal protection concept. Indeed, one might almost say that there are two equal protection clauses or at least, since some kinds of preferential classification are more readily forbidden than others, there is something akin to a scale of preferences within the equal protection clause itself.

Where the state, in its police power capacity to regulate health, morals, and general welfare, imposes a classification scheme intended to regulate economic or social welfare matters, the coverage of "reasonableness" is comfortably loose, and there rests upon him who would challenge the classification a heavy burden in seeking to overcome the presumption of constitutionality. See, *e.g.*, *Lindsley* v. *Natural Carbonic Gas Co.*, 220 U. S. 61 (1911); *Tigner* v. *Texas*, 310 U. S. 141 (1940); *Nashville, C. & St.*

L. Ry. v. *Browning*, 310 U. S. 362 (1940); *Kotch* v. *Board of River Port Pilot Comm'rs*, 330 U. S. 552 (1947); *Goesaert* v. *Cleary*, 335 U. S. 464 (1948); *Railway Express Agency* v. *New York*, 336 U. S. 106 (1949); *Williamson* v. *Lee Optical, Inc.*, 348 U. S. 483 (1955). But where the classification impinges upon the "basic civil rights of man" (*Skinner* v. *Oklahoma*, 316 U. S. 535, 541 [1942]), the latent libertarianism that always lies close to the surface of equal protection emerges to overcome the presumption of constitutionality and to demand rigorous examination of the standards set.

The clearest case for absolute prohibition of all classification appears in the case of state-supported racial discrimination. *Brown* v. *Board of Education*, 347 U. S. 483 (1954); *Mayor & City Council* v. *Dawson*, 350 U. S. 877 (1955); *Gayle* v. *Browder*, 352 U. S. 903 (1956); *State Athletic Comm.* v. *Dorsey*, 359 U. S. 533 (1959); *Turner* v. *Memphis*, 369 U. S. 350 (1962); *Johnson* v. *Virginia*, 373 U. S. 61 (1963); *Peterson* v. *City of Greenville*, 373 U. S. 244 (1963); *Watson* v. *City of Memphis*, 373 U. S. 526 (1963); *Goss* v. *Board of Educ.*, 373 U. S. 683 (1963).

The equal protection clause has been given a near-absolutist reading in other areas where the issue involves the "basic civil rights of man." Discrimination on grounds of alienage has been frequently struck down on equal protection grounds. *Yick Wo* v. *Hopkins*, 118 U. S. 356 (1886); *Oyama* v. *California*, 332 U. S. 633 (1948); *Takahashi* v. *Fish and Game Comm'n*, 334 U. S. 410 (1948). See also *Skinner* v. *Oklahoma*, 316 U. S. 535 (1942); *Griffin* v. *Illinois*, 351 U. S. 12 (1956); *Eskridge* v. *Washington State Prison Bd.*, 357 U. S. 214 (1958).

The tension between these two sides of the equal protection clause is the specific issue of substance in the cases now before the Court. Shall the equal protection clause, in the face of proved impairment of the right of franchise as a result of gross inequalities in voter representation, be read to impose almost no restriction on the legislative power of classification, as in the state economic and social welfare cases? Or, remembering that the right of franchise is "a fundamental political right, because preservative of all rights" (*Yick Wo* v. *Hopkins*, 118 U. S. 356, 370 [1886]), shall the equal protection clause be read to require equality in voter representation? We submit that established constitutional principles require that the first question be answered No and the second Yes.

It is now well established that "There may be narrower scope for operation of the presumption of constitutionality when legislation appears on its face to be within a specific prohibition of the Constitution • • •," particularly in the case of "legislation which restricts • • • political processes • • •." *United States* v. *Carolene Products Co.*, 304 U. S. 144, 152 n. 4 (1938). Thus, with respect to restraints on freedom of expression, this Court said, in *Speiser* v. *Randall*, 357 U. S. 513, 526 (1958):

> Where the transcendent value of speech is involved, due process certainly requires in the circumstances of this case that the state bear the burden of persuasion • • •.

Cf. Tot v. *United States*, 319 U. S. 463, 469 [1943]; *Staub* v. *Baxley*, 355 U. S. 313, 318-319 [1958].

The same considerations which justify reversal of the presumption of constitutionality when limitations are placed on free speech apply with equal force when the sub-

stantial claim is that the right of franchise has been impaired by state action. The Court long ago stated in *Yick Wo* v. *Hopkins*, 118 U. S. 356, 370 (1886) that the political franchise "is regarded as a fundamental political right, because preservative of all rights." As in the case of free speech, this is an area in which restraint operates to impair operation of the political process which would otherwise be available for correction of abuses. It is accordingly proper that, where a substantial showing is made of severe population disparities among election districts, the presumption should be overcome and the state should have the burden of justification. Here, as in the case of another "highly sensitive constitutional area," only a "compelling state interest" can justify substantial infringement of the basic constitutional right to vote. *Sherbert* v. *Verner*, 374 U. S. 398 (1963).

State and federal courts which have considered the issue in the context of apportionment have almost invariably concluded that the presumption may be overcome by a showing of substantial inequality. *Moss* v. *Burkhart*, 207 F. Supp. 885, 891 (W. D. Okla. 1962); *Lisco* v. *McNichols*, 208 F. Supp. 471, 477-78 (D. Colo. 1962); *Thigpen* v. *Meyers*, 211 F. Supp. 826, 832 (W. D. Wash. 1962); *Mann* v. *Davis*, 213 F. Supp. 577, 584 (E. D. Va. 1962); *Sincock* v. *Duffy*, 215 F. Supp. 169, 189 (D. Del. 1963); *Davis* v. *Synhorst*, 217 F. Supp. 492, 497 (S. D. Iowa 1963); *Scholle* v. *Hare*, 367 Mich. 176, 187, 116 N. W. 2d 350, 355 (1962). The only significant case which at first appears contrary is the New York case, No. 20, in which the three-judge district court recognized the presumption "and the principle that a violation must be clear before a federal court of equity will lend its power to the disruption of the state

election processes * * *." *WMCA, Inc.* v. *Simon*, 208 F. Supp. 368, 373 (S. D. N. Y. 1962). But even there the court did not deny that the presumption could be overcome by a clear showing of inequality. *Cf. Sobel* v. *Adams*, 208 F. Supp. 316, 324 (S. D. Fla. 1962); *Thigpen* v. *Meyers*, 211 F. Supp. 826, 830 (W. D. Wash. 1962) (a population ratio of 1.5 to 1 from the largest to the smallest congressional district held not per se discriminatory, although the state legislative apportionment was upset in the same case on a showing of greater disparity); *Caesar* v. *Williams*, 371 P. 2d 241 (Ida. 1962).

Once substantial disparity has been demonstrated with respect to one or both houses of a state legislature, defendants must then "adduce evidence of the presence of other factors which might explain this disproportion * * *." *Mann* v. *Davis*, 213 F. Supp. 577, 584 (E. D. Va. 1962). Thereafter, "If defendants are able to show a rational basis for the classifications made, such showing will refute plaintiffs' prima facie case." *Davis* v. *Synhorst*, 217 F. Supp. 492, 497 (S. D. Iowa 1963). The ultimate issue, then, requires evaluation of the various defenses urged by state officials in justification of the alleged rationality of their unequal apportionment plans.

III

THE JUSTIFICATIONS ADVANCED BY STATE OFFICIALS FOR THE APPORTIONMENT PLANS CHALLENGED IN THESE CASES ARE INSUFFICIENT TO OVERCOME THE SHOWING OF GROSS INEQUALITY DEMONSTRATED IN EACH OF THE CASES BEFORE THE COURT.

A. Area

The claim that special weight should be given to geography is self-refuting. Pastures, rivers and trees do not vote and do not deserve representation in state legislatures. Government does not exist for their benefit. No one suggests that legislators should be chosen from uninhabited areas.

Yet, it is scarcely more logical to weight acreage in determining voter representation, although this has been attempted in the recently adopted Michigan constitution, where one voter and nineteen acres are valued as equals. 1962 Mich. Const., art. IV, sec. 2. There is not in any of the cases now before the Court such a bald attribution of weighting to area as in Michigan; but in each of the cases the effect of the existing provisions is to favor land masses directly or indirectly, necessarily at the expense of the right of franchise of individual voters.*

In truth, the argument is not precisely that area as such is entitled to special weighting in the fixing of election districts. The contention is rather that rural

* In the New York case, for example, Judge Levet frankly acknowledged his approval of geographical weighting at the expense of full representation of a clear majority of voters in the state. He said:

> The six counties in which plaintiffs reside contain 56.2% of the citizen population of the State, but those counties comprise only 3.1% of the area of the state. (208 F. Supp. 368, 379. See also Ryan, J., concurring, *id.* at 385.)

interests should be represented out of proportion to their number because rural voters are scattered over substantial areas as contrasted with the concentration of voters in the cities. Justification is apparently based on a claim that it is more difficult to campaign in rural than in urban areas because of the differently concentrated voter constituencies, and that it is accordingly permissible to reduce the proportionate value of the city dweller's right of franchise.

We doubt that the assumptions on which this attempted justification is based can be proved in this electronic age.* But in any case, they do not justify the drastic remedy of impairing the voting rights of millions of urban and suburban citizens. That would be to deal with one evil by creating a far greater one—one that runs counter to the basic constitutional guarantees of equality.

Preference for rural voters is sometimes sought to be justified on the ground that counties with "concentrated masses • • • have practical opportunities for exerting their political weight at the polls not available" to "thinly populated counties • • •" *MacDougall* v. *Green*, 335 U. S. 281, 284 (1948). We submit that there are no such "opportunities." Indeed, that is the very point of all these cases: The complainants from the more populous counties allege that they are denied even *equal* "opportunities for exerting their political weight at the polls • • •."**

* It can equally be argued that representatives of rural areas enjoy advantages because of the lower cost of newspaper, radio and television coverage and the greater homogeneity of their constituencies.

** It need hardly be added that the holding in the *MacDougall* case is not controlling or even persuasive here. To say, as the Court did in that case, that the state is not obligated to allow every aspiring political party to participate in elections is very different from saying that it has no obligation to treat all voters equally.

B. History

The appeal to history in justification for inequalities of voter representation cannot withstand analysis under the challenge of the equal protection clause of the fourteenth amendment, which must be read in the present tense. If a given apportionment plan produces gross inequality, it cannot be saved by showing either that the inequality has existed or that it developed gradually over a long period of time. Institutions are justified by history only if it shows that they have worked well. Moreover, as we have seen, departures from equality of representation can be justified, if at all, only by the need to serve compelling public objectives. Preservation of long-continued practice is not such an objective.

The instant cases reveal that the historical argument is little more than an effort to justify inequality solely on the ground that it has existed for a long time. As in *Baker* v. *Carr, supra,* the history in each state illumines rather than justifies the evil.

The Alabama constitution requires that the senatorial districts "shall be as nearly equal to each other in the number of inhabitants as may be * * *" (Ala. Const. art. 8, §200), and states that "The members of the house of representatives shall be apportioned by the legislature among the several counties of the state, according to the number of inhabitants in them * * *" (*id.*, §198). In addition, article 18, section 284 contains the general mandate that "Representation in the legislature shall be based upon population * * *." See comment, *Alabama's Unrepresentative Legislature,* 14 Ala. L. Rev. 403 (1962). Even though other provisions of the state constitution made impossible the achievement of absolute equality, it is clear that the present situation is due to the fact that the legis-

lature has not even attempted to achieve equality and that, as in Tennessee, it failed to comply with its decennial obligation of reapportionment between 1901 and the abortive recasting of election districts in 1962. See *Sims* v. *Frink*, 208 F. Supp. 431, 433-35 (M. D. Ala. 1962); *Opinion of the Justices of the Supreme Court of Alabama, No. 117, August 14, 1950*, 254 Ala. 185, 187, 47 So. 2d 714, 717 (1950); *Opinion of the Justices of the Supreme Court of Alabama, No. 148, July 11, 1955*, 263 Ala. 153, 164, 81 So. 2d 881, 887 (1955).

The situation in Virginia is not different. In *Mann* v. *Davis*, 213 F. Supp. 577, 584 (E. D. Va. 1962), the three-judge court reviewed the state constitutional provisions relating to apportionment and concluded that "there is little doubt that in Virginia population is the overriding consideration in any distribution of representatives." In view of the fact that population was the "predominant," if not the "sole," factor which had historically controlled the fixing of Virginia election districts, it can scarcely be argued that history supports the gross inequalities which prevailed in Virginia when the present suit was instituted.

In the New York case, the three-judge court's conclusion that the apportionment provisions "are of substantially historical origin" (*WMCA, Inc.* v. *Simon*, 208 F. Supp. 368, 380 [S. D. N. Y. 1962]), is at least misleading. Indeed, if the reference to "historical origin" related to the three New York constitutions preceding the now-controlling constitution of 1894, the statement is simply inaccurate.* The 1894 Constitution, as we have seen, was

* See Appendix B of Brief for the Appellants in *WMCA, Inc.* v. *Simon*, No. 20, for a showing that before 1894 the relevant provisions permitted, and indeed required, much greater equality of citizen population among election districts than has been true at any subsequent time.

frankly designed to discriminate against urban areas (*supra*, p. 24n). Moreover, under the formula adopted at that time, the disparities in voter representation between the least populous and the most populous counties worsened with each successive apportionment. No. 20, Pls. Exhs. 1-5; R. 159, 243-47. Such a history cannot be used to justify inequality of voting rights.

The historical argument is most strongly pressed in the Maryland case because earlier versions of the Maryland plan may have served in part as a model for the composition of Congress and for the federal electoral college. *Maryland Comm. for Fair Representation* v. *Tawes*, 229 Md. 406, 412-14, 184 A. 2d 715, 718-19 (1962). But it is significant that the most important features of the Maryland system which may have been copied in the national government have now disappeared from Maryland election practice. The indirect election of state legislators was abandoned in 1837. Radoff, *The Old Line State* 64 (1956). And the unit system previously employed in statewide primary elections was held invalid by a three-judge federal court shortly after the parallel system in Georgia was ruled unconstitutional in *Gray* v. *Sanders*, 372 U. S. 368 (1963). *Maryland Comm. for Fair Representation* v. *Tawes*, —— F. Supp. —— (D. Md., May 10, 1963). As the Court stated in *Gray* v. *Sanders*, 372 U. S. at 378, "the analogies to the electoral college, to districting and redistricting, and to other phases of the problems of representation in state or federal legislatures or conventions are inapposite."

It has been suggested above that history is essentially irrelevant in determining present violation of one of the "basic civil rights of man" when tested against the equal

protection concept. But in truth, if history were to be invoked at all, the equal-population principle should carry the day. However great may have been the inequalities in the districts which made up the colonial assemblies, "when the colonies declared themselves states and proceeded to elect legislatures to draft their own constitutions, not a few rectified the imbalances that had existed prior to independence." Hacker, *Congressional Districting* 5 (1963). The Northwest Ordinance of 1787 was specific in its command:

> The inhabitants of the said territory shall always be entitled to the benefits * * * of a proportional representation of the people in the Legislature. (Art. II, §14.)

In the half century following the ratification of the Constitution,

> the tendency toward thoroughgoing political equality was increasingly accentuated * * *. Americans came to believe that they were all political equals, and they were prepared to act on that belief. The idea that one man, no matter what his origins or attainments, is as good as another became ingrained in the national character. (Hacker, *supra*, at 14-15.)

Departures from this salutary principle did not become widespread until the latter part of the nineteenth century. Although the original constitutions of 36 states required that representation be based completely, or almost so, on population, subsequently "this pattern was to change because of the growth of big cities." Advisory Comm. on Intergovernmental Relations, Apportionment of State Legislature 11 (1962). The further distortions of

the twentieth century are notorious, further aggravated by the sharp acceleration of the population shift, first to the cities and then to the suburbs, and the frequent legislative failure to act in compliance with state constitutional commands for reapportionment. No theory of constitutional law justifies using this recent history to sanction ever widening departures from the principle of equality.

C. *The Federal Analogy*

A variant of the historical argument is the claim that population can be altogether disregarded in one, if not both, houses of a bicameral legislature because that is the pattern adopted in the federal Congress. In the cases now before the Court this is not a threshold question because in none of them does even one house of the legislature satisfy the requirement of equality of election districts, which is the unstated but essential premise of an analogy drawn to Congress in which seats in the House of Representatives are apportioned on the basis of approximate equality of population.*

The federal analogy is nonetheless implicitly at issue in all the cases before the Court, including the Maryland case, because of the frequently heard argument that the fourteenth amendment is satisfied by application of the equal-population principle to one house. There is already a strong consensus in the state and lower federal courts

* The Maryland court of appeals apparently regarded the test as satisfied after partial reapportionment of the lower house by the legislature in 1962. But this can scarcely be the case where the 76 percent of the voters from the most populous area are still represented by only 55 percent of the members of the house of delegates and where the ratio of voter representation between the least populous and the most populous counties is a startling 32 to one.

that population must be the primary consideration in *at least* one house.*

In view of this almost total unanimity, we here focus our attention on the question whether the second house must also meet the same test. We submit that the federal analogy should be rejected, and equal representation be required in both houses, for several independent reasons.

1. The Constitution itself rejects the relevance of analogies drawn to the method of selection of members of the two houses of Congress. The allotment of two senators to each state is made not by legislative act but by an express constitutional provision which was the result of a necessary political compromise. That provision makes the organization of the Senate a special exception to the com-

* *Sims* v. *Frink*, 208 F. Supp. 431, 438 (M. D. Ala. 1962) (both houses); *Lisco* v. *McNichols*, 208 F. Supp. 471 (D. Colo. 1962), *id.*, ——— F. Supp. ——— (D. Colo., July 16, 1963); *Sincock* v. *Duffy*, 215 F. Supp. 169, 188 (D. Del. 1963) (both houses); *Sobel* v. *Adams*, 208 F. Supp. 316 (S. D. Fla. 1962); *Toombs* v. *Fortson*, 205 F. Supp. 248, 257 (N. D. Ga. 1962); *Davis* v. *Synhorst*, 217 F. Supp. 492, 499 (S. D. Iowa 1963); *League of Municipalities* v. *Marsh*, 209 F. Supp. 189 (D. Neb. 1962) (unicameral); *Nolan* v. *DiSalle*, ——— F. Supp. ——— (S. D. Ohio, June 12, 1963); *Moss* v. *Burkhart*, 207 F. Supp. 885 (W. D. Okla. 1962), *id.*, ——— F. Supp. ——— (W. D. Okla., July 17, 1963) (both houses); *Baker* v. *Carr*, 206 F. Supp. 341, 349 (M. D. Tenn. 1962); *Mann* v. *Davis*, 213 F. Supp. 577, 584-85 (E. D. Va. 1962) (both houses); *Wisconsin* v. *Zimmerman*, 209 F. Supp. 183 (W. D. Wis. 1962); *Caesar* v. *Williams*, 371 P. 2d 241 (Ida. 1962); *Maryland Comm. for Fair Representation* v. *Tawes*, 184 A. 2d 715, 718-21 (Md. 1962); *Scholle* v. *Hare*, 367 Mich. 176, 116 N. W. 2d 350 (1962) (both houses); *Jackman* v. *Bodine*, 188 A. 2d 642, 651 (N. J. Ch. 1962); *Sweeney* v. *Notte*, 183 A. 2d 296 (R. I. 1962); *Mikell* v. *Rousseau*, 183 A. 2d 817 (Vt. 1962). Apparently the only court which has not conceded that population must control in at least one house is the three-judge court in the New York case, in which the court regarded population as only one factor to be taken into account, along with "area, accessibility and character of interest." *WMCA, Inc.* v. *Simon*, 208 F. Supp. 368, 376 (S. D. N. Y. 1962).

mand of equality—a command made applicable to the states by the fourteenth amendment. The senate analogy cannot be used to carve an exception out of the clear command of the equal protection clause.

Reliance on history as a basis for the analogy is not sound. The dominant spirit at the Constitutional Convention in 1787, particularly as revealed in the Virginia Plan, favored proportionate representation in both houses of Congress. The egalitarian ideal of fairness in political representation had already been emphasized in the Declaration of Independence. As Thomas Jefferson later said, looking back to this earlier period: "Equal representation is so fundamental a principle in a true republic that no prejudice can justify its violation because the prejudices themselves cannot be justified." Letter to William King, Nov. 19, 1819, Jefferson Papers, Lib. of Cong., vol. 216, p. 38616.

In the eighteenth century, when broad limitations upon exercise of the franchise were still widely accepted, it is interesting that the principle of full equality should almost have succeeded in the provisions for election of members to both houses of Congress and that it was thereafter widely adopted as applicable to both houses of state legislatures. That the equal-population principle succeeded in only one house of Congress was simply a matter of practical politics. In order to secure the necessary agreement of sovereign states for the formation of a consensual union, a compromise of principle was made, which was not even then regarded as controlling in the formation of state legislatures.

2. The truth is that reliance on the federal analogy seems to be principally an after-the-fact rationalization in support of a variety of legislative apportionment schemes, many of which have very little in common with the congressional plan of representation. Only seven states, Arizona, Idaho, Montana, Nevada, New Jersey, New Mexico, and South Carolina, apportion their senates strictly according to state political units, while Vermont apportions its house by towns. Report of the Advisory Comm. on Intergovernmental Relations, *Apportionment of State Legislatures*, 14 n. 55 (1962). Not even Maryland, as to which the federal analogy has been specifically made an issue, qualifies. Although each county is entitled to one senator, the City of Baltimore is divided into six election districts which are not political units of the state for any other governmental purpose.

It is apparent that the permissibility of existing legislative apportionments should not depend on any real or imagined similarity to the congressional plan, but upon their intrinsic rationality or lack thereof in terms of the existing state election systems, when tested against the equal protection clause. That clause must be read in the light of contemporary experience, rather than with an over-the-shoulder glance at a different practice by a different sovereign whose action is required by the Constitution.

3. Counties and towns, unlike states, have no sovereign existence apart from the state which created them and which could at any time alter their boundaries or terminate their existence. The national government was founded by the states and was thus their creature, but the relation-

ship between the states and their political subdivisions is exactly opposite. States are guaranteed against dismemberment without their consent (U. S. Const., art. IV, sec. 3) and the tenth amendment guarantees to the several states all powers not delegated to the federal government or specifically forbidden in the Constitution. No such provisions protect towns or counties from the plenary powers of the states over their existence, functioning, and representation in the legislature.

In *Hunter* v. *City of Pittsburgh*, 207 U. S. 161, 178 (1907), the Court described the right of the state to alter local governmental lines: "The number, nature and duration of the powers conferred upon these corporations and the territory over which they shall be exercised rests in the absolute discretion of the state." See also *Sims* v. *Frink*, 208 F. Supp. 431, 438 (M. D. Ala. 1962); *Sincock* v. *Duffy*, 215 F. Supp. 169, 186 (D. Del. 1963); *Mann* v. *Davis*, 213 F. Supp. 577, 584-85 (E. D. Va. 1962). Today an exception should be read into that categorical statement. A rearrangement on grounds of race or color is forbidden by the fifteenth amendment. *Gomillion* v. *Lightfoot*, 364 U. S. 339 (1960). Similarly, a tampering with political lines in order to discriminate on grounds of religion or ethnic origin would surely be forbidden by the equal protection clause. It is not a very long step from that proposition to the principle that no apportionment may be accomplished which has the effect of diluting the vote of any group of the citizenry.

4. It is argued that accommodation to full equality of voter representation in both houses of a state legislature would destroy the purpose of the bicameral legislative

body. But this is largely based upon an appeal to what is constitutionally irrelevant and factually erroneous. There is nothing inherently sacred in the bicameral concept.*

It is not, however, necessary to reject the strong American tradition in favor of bicameralism. Even when full equality of election districts is achieved in both houses of a state legislature, each house can continue to serve a separate and distinct function.** In nearly every state, the terms of office are different in the two houses so that members of one house seek renewal of their elective mandate more frequently than in the other. Moreover, the constituencies are ordinarily different. In a typical situation, each member of the upper house has two to four times as many constituents in his district as does his lower house colleague. As a result the member of the lower house ordinarily has a more homogeneous constituency whose views he can represent with parochial narrowness while his counterpart in the other chamber must necessarily accommodate himself to a greater variety of views.

5. The most important reason of all for rejecting the federal analogy derives directly from the democratic principle. There is no justification for allowing any minority interest group, whether rural voters or any other, to gain

* Nebraska has long had a unicameral legislative body, and political scientists contend that in any event the unicameral legislature is more effective than the bicameral. National Municipal League, *Model State Constitution* 42-44 (6th ed. 1963). See also *Mann* v. *Davis*, 213 F. Supp. 577, 584-85 (E. D. Va. 1962).

** The argument that it is pointless to have two legislative chambers both elected on a representational basis apparently did not impress the many states whose original constitutions called for just that arrangement (*supra*, p. 39).

absolute control of a state legislature with concomitant power to enact legislation which is unacceptable to the majority. It is one thing to preserve restraint upon majority action through the power of executive veto, by special majorities for change of organic law, by bills of rights, and otherwise. But it is quite another matter, and utterly indenfensible, to place in the hands of a minority the power to enact positive legislation along with the power to prevent diminution of its own dominant role in the legislative process.

D. Availability of the Initiative

It is sometimes suggested that malapportionment is justifiable, or at least not irrational in its discrimination, where "the ultimate constituent power [is] allowed an adequate opportunity to express itself." McCloskey, *The Reapportionment Case*, 76 Harv. L. Rev. 54, 71 (1962). The argument seems to be that, in the approximately twenty states which have the initiative (Baker, *State Constitutions: Reapportionment* 47 [National Municipal League Pamphlet 1960]), the equal protection clause imposes no restraint because of the presumed power in the voters to take corrective action by resort to the initiative or its equivalent. If that doctrine should prevail, we might then expect states which do not now have the initiative "to accept the implicit invitation to bypass the *Baker* ruling by adopting such devices." Sindler, *Baker* v. *Carr: How to "Sear the Conscience" of Legislators*, 72 Yale L. J. 23, 32 (1962). For the hard fact is that the initiative has proved unwieldy in operation, costly for those who seek to avail themselves of the technique, and uncertain

as a means of testing actual voter sentiment on the questions sought to be posed.*

However, there is a more fundamental answer to this argument. No one would suggest that segregation could be reimposed by the "will of the people" manifested through state constitutional amendments adopted pursuant to initiative procedures. Equally, religious discrimination could not be imposed by initiative. The right of franchise should be similarly protected from diminution even by a presumably clear expression of the popular will. "The inalienable constitutional right of equal protection cannot be made to depend upon the will of the majority." *Thigpen* v. *Meyers*, 211 F. Supp. 826, 832 (W. D. Wash. 1962). See also Note, *Baker* v. *Carr and Legislative Apportionments: a Problem of Standards*, 72 Yale L. J. 968, 984-88 (1963).

Although the initiative is not available as such in any of the states whose cases are now before the Court, a variant of the initiative argument is at least faintly urged in the New York case. The New York constitution provides for a referendum every twenty years on the question of whether to call a constitutional convention. In 1957 the voters rejected such a call, but there is no reason to believe that this was in any way a ratification of existing malapportionment. See Brief of Appellee, Paul R. Scre-

* In holding that the availability of the initiative is not an adequate remedy for existing malapportionment, the three-judge court in *League of Nebraska Municipalities* v. *March*, 209 F. Supp. 189, 193 (D. Neb. 1962), noted the impracticality of resort to this device by an individual voter and concluded that "In addition, the expense of putting an initiated proposal on the ballot in Nebraska is prohibitive for the ordinary voter." See also *Toombs* v. *Fortson*, 205 F. Supp. 248, 256 (N. D. Ga. 1962); *Davis* v. *Synhorst*, 217 F. Supp. 492, 500 (S. D. Iowa 1963); *Moss* v. *Burkhart*, ——— F. Supp. ——— (W. D. Okla. July 17, 1963); *Thigpen* v. *Meyers*, 211 F. Supp. 826, 832 (W. D. Wash. 1962).

vane in support of Appellants in No. 20, at pages 78-90. See also *Scholle* v. *Hare*, 367 Mich. 176, 116 N. W. 2d 350 (1962). Even if the 1957 vote could be read to approve the existing formula, there is no basis for requiring the electorate to wait until 1977 for another chance at the same question. Then, as before, voters might well hesitate to ask reconsideration of the apportionment formula in a body constituted by the already malapportioned legislature in a manner which would discriminate against the same class of voters disadvantaged by the present formula.

E. Governmental Boundaries

The only argument which has any merit as a possible supplement to—but not substitute for—the equal-population principle is the proposition that in drawing election district lines some respect should be accorded to existing governmental boundaries. Two arguments can be advanced in support of this proposition.

In the first place, in some states, counties and other local governmental units continue to exercise some, although ever-decreasing, governmental functions, and thus may deserve a hearing in state legislative chambers through legislators who will have those interests in mind. This is not to say that each such unit deserves separate representation in both houses, or even in one house, but simply that it may be desirable to preserve governmental lines wherever that can be done without compromise of the equal-population principle.

Of the cases now before the Court the argument is most explicitly made in the Maryland case where the state court observed that the counties "have traditionally exercised wide governmental powers * * *." *Maryland Comm.*

for Fair Representation v. *Tawes*, 229 Md. 406, 412, 184 A. 2d 715, 718 (1962). See also *Sobel* v. *Adams*, 208 F. Supp. 316, 321-22 (S. D. Fla. 1962); *Davis* v. *Synhorst*, 217 F. Supp. 492, 499 (S. D. Iowa 1963); *Baker* v. *Carr*, 206 F. Supp. 341, 346 (M. D. Tenn. 1962); *Jackman* v. *Bodine*, 188 A. 2d 642, 648-49 (N. J. Ch. 1962). The typical pattern, however, has been toward a decline in the functions of government committed to the counties, as the court observed in *Sincock* v. *Duffy*, 215 F. Supp. 169, 186 (D. Del. 1963).

In the second place, a requirement of observance of existing boundaries to the extent possible can be helpful in preventing the harm of gerrymandering. Experience shows that respect for existing boundary lines will not absolutely prevent gerrymandering but can at least make it more difficult of accomplishment.

The fact that the observance of the boundaries of existing governmental units has certain advantages does not, however, mean that it can be used to justify disregard of the principle of equality. Yet that is precisely what is done when counties are given equal representation, or a maximum number of representatives, regardless of size. We submit that apportionment provisions that look toward rigid prescription of boundary lines must be held to be constitutionally objectionable to the extent that they result in appreciable departure from equality.

We believe that it is decisive of the constitutional question in these cases that no showing has been made that existing governmental boundaries cannot be observed under an apportionment scheme that achieves substantial equality of voter representation. In each of the affected states, there is gross malapportionment that plainly does violence to the requirement of equality. The defendant

state officials have failed to show that their unequal systems are necessary to the achievement of essential governmental objectives. Unless they do so, the existing inequities must be held to be unconstitutional.

The question may finally be asked: How much deviation is too much? No one suggests that exact mathematical equality is required. See, *e.g.*, *Sims* v. *Frink*, 208 F. Supp. 431, 439 (M. D. Ala. 1962); *Lisco* v. *McNichols*, 208 F. Supp. 471, 476 (D. Colo. 1962); *WMCA, Inc.* v. *Simon*, 208 F. Supp. 368, 376 (S. D. N. Y. 1962); *Moss* v. *Burkhart*, —— F. Supp. —— (W.D. Okla. July 17, 1963); *Baker* v. *Carr*, 206 F. Supp. 341, 345 (M. D. Tenn. 1962); *Mikell* v. *Rousseau*, 183 A. 2d 817, 821-23 (Vt. 1962); *Mann* v. *Davis*, 213 F. Supp. 577, 584 (E. D. Va. 1962); *Thigpen* v. *Meyers*, 211 F. Supp. 826, 831 (W. D. Wash. 1962). But the gross disparities and egregious malapportionments demonstrated in each of the cases now before the Court offer no such problems of refined choice. These are not twilight cases, but more nearly instances of noon and midnight.

Some courts have suggested that disparities in excess of two to one are invalid, and that those in the narrower range may still be suspect. See *Scholle* v. *Hare*, 367 Mich. 176, 188-89, 116 N. W. 2d 350, 355 (1962); Goldberg, *The Statistics of Malapportionment*, 72 Yale L. J. 90, 93 (1962). The doubtful validity of even a two-to-one ratio was recognized by the court in *Sincock* v. *Duffy*, 215 F. Supp. 169, 190 (D. Del. 1963): "A ratio of two to one is one of 100% and we can perceive no sound basis for such a broad ratio in this State." See also *McDougall* v. *Green*, 355 U. S. 281, 288 (Douglas, Black and Murphy, JJ., dissenting) (1948). There appears to be no reason in mathematics, history, analogy, or existing political structure to justify *any* sig-

nificant deviation from the equal-population principle in either house of the state legislature in any of the cases now before the Court.

We conclude, with the majority of the Advisory Commission on Intergovernmental Relations, in its December 1962 Report on Apportionment of State Legislatures (p. 67), that "'Equal protection of the laws' would seem to presume, and considerations of political equity demand, that the apportionment of both houses in the State legislature, be based strictly on population."

It remains only for this Court to state unequivocally the primacy of the equal-population principle, leaving implementation to state legislatures. Ordinarily, no more drastic remedy will be necessary than a clear statement as to the requirements of equal protection in the context of apportionment and districting, while directing the appropriate lower federal courts and state courts to retain jurisdiction pending prompt and complete legislative correction. The sanction of more drastic judicial action should thus become unnecessary, although its availability should be clearly indicated in the event of necessity.

CONCLUSION

FOR THE REASONS SET FORTH ABOVE, THE *AMICI* URGE THE INVALIDATION OF THE APPORTIONMENT PLANS IN EACH OF THE CASES NOW BEFORE THE COURT FROM ALABAMA, MARYLAND, NEW YORK, AND VIRGINIA, AND THE ENUNCIATION OF A REQUIREMENT OF EQUALITY OF VOTER REPRESENTATION IN ACCORDANCE WITH THE REQUIREMENTS OF THE EQUAL PROTECTION OF THE LAWS CLAUSE OF THE FOURTEENTH AMENDMENT.

Respectfully submitted,

LEO PFEFFER,
Attorney for American Jewish Congress,
15 East 84th Street,
New York 28, New York,

MELVIN L. WULF,
Attorney for American Civil Liberties Union,
156 Fifth Avenue,
New York 10, New York,

JACK GREENBERG,
Attorney for N. A. A. C. P. Legal Defense and Educational Fund, Inc.,
10 Columbus Circle,
New York 19, New York,

ROBERT B. McKAY,
Of Counsel.

Amici Curiae.

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